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6 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

7 UNITED STATES OF AMERICA,

8 Plaintiff,

9 v.

10 ROGER FIANDER,

11 Defendant.
12

NO. CR-05-2099-RHW-8

**ORDER GRANTING MOTION
TO WITHDRAW PLEA**

13 Before the Court is Defendant's Motion to Vacate or for Leave to Withdraw
14 from Plea Agreement (Ct. Rec. 519). Defendant seeks to withdraw the guilty plea
15 he entered on April 19, 2007, to Count 1 of the indictment: conspiracy to violate
16 RICO (18 U.S.C. § 1962(d)).

17 After accepting a guilty plea, but before imposing sentence, a Court may in
18 its discretion permit a Defendant to withdraw said plea if "the defendant can show
19 a fair and just reason for requesting the withdrawal." Fed. R. Crim. Pro.
20 11(d)(2)(B). The defendant bears the burden of making such a showing, but the
21 "fair and just" standard must be applied liberally. *United States v. Ortega-Ascanio*,
22 376 F.3d 879, 883 (9th Cir. 2004). Fair and just reasons include "intervening
23 circumstances, or any other reason for withdrawing the plea that did not exist when
24 the defendant entered his plea." *Id.* Whether a defendant seeking withdrawal has
25 claimed he is legally innocent is an important factor to be weighed in this context.
26 *Id.* at 883-84 (citing Fed. R. Crim. Pro. 32(d), Advisory Committee Notes (1983
27 Amendments)).

28 Defendant's primary argument in support of his motion is a claim of legal

1 innocence – *viz.*, that his participation in the instant conspiracy was not “knowing”
2 because he lacked knowledge of his co-Defendants’ illegal conduct. The
3 Government argues in response that Defendant’s knowledge “was well fleshed-out
4 by the Court during the change of plea” (Ct. Rec. 526).

5 The Court previously characterized Defendant’s statements at the change of
6 plea hearing as expressing that “his knowledge of the conspiracy was limited to his
7 participation in it as a transporter of cigarettes and currency” (Ct. Rec. 422). At
8 that hearing, Defendant stated that he was “not [] completely knowledgeable of all
9 the activities” of the conspiracy (Ct. Rec. 419, p. 21, lns. 13-14). The plea
10 agreement’s factual basis is preceded by a disclaimer: “The United States and the
11 Defendant agree, to the extent that Roger FIANDER had personal knowledge of
12 the following factual statements, they are accurate” (Ct. Rec. 411, p. 6, lns. 4-6).

13 After Defendant entered his guilty plea, the legal framework of this case was
14 restructured by *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007), and *United*
15 *States v. Fiander*, 547 F.3d 1036 (9th Cir. 2008). These decisions provide guidance
16 and clarity regarding the elements of the crime to which Defendant pleaded that
17 were not available when Defendant entered his plea. The Court finds that these
18 decisions constitute the kind of “intervening circumstances” that justify withdrawal
19 of a plea. *Ortega-Ascanio*, 376 F.3d at 883. Moreover, Defendant’s claim of legal
20 innocence also weighs in favor of granting leave to withdraw.

21 Accordingly, **IT IS HEREBY ORDERED:**

22 1. Defendant’s Motion to Vacate or for Leave to Withdraw from Plea
23 Agreement (Ct. Rec. 519) is **GRANTED**.

24 2. The guilty plea Defendant entered on April 19, 2007, to Count 1 of the
25 indictment, is **vacated**.

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IT IS SO ORDERED. The District Court Executive is directed to enter this Order and forward copies to counsel.

DATED this 23rd day of December, 2008.

s/Robert H. Whaley
ROBERT H. WHALEY
Chief United States District Judge

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